APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 26, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-50602
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARNOLDO LOPEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:04-CR-209-ALL

Before JOLLY, DAVIS, and OWEN, Circuit Judges.

PER CURIAM:*

Arnoldo Lopez appeals from his conviction by guilty of distribution of heroin, for which Lopez was sentenced to

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

35 years of imprisonment, a sentence less than the mandatory statutory term of life imprisonment. Lopez contends that counsel was ineffective for failing to provide accurate advice regarding the practical meaning of Lopez's appeal-waiver provision; that counsel was ineffective for failing to move for the exclusion of his videotaped confession; that counsel was ineffective for failing to object to the firearm adjustment to Lopez's offense level; and that counsel's ineffective actions, taken cumulatively, demonstrated performance so deficient that prejudice should be presumed pursuant to *United States v. Cronic*, 466 U.S. 648 (1984).

To prevail on an ineffective-assistance-of-counsel claim, an applicant must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, the applicant must show that counsel's actions "fell below an objective standard of reasonableness." *Id.* at 688. To prove prejudice, the applicant must show that "there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, and that "counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

Lopez's plea agreement contained the following provision:

> The Defendant expressly waives the right to appeal his sentence on any ground, other than for ineffective assistance of counsel or prosecutorial

> misconduct of constitutional dimension. Similarly, the Defendant agrees not to contest his sentence or the manner in which it was determined in any post-conviction proceeding, including, but not limited to, a proceeding under 28 U.S.C. § 2255.

Lopez misreads the waiver provision. The waiver has no effect on his ability to appeal, or seek 28 U.S.C. § 2255 relief from, his *conviction*; the provision affects only his ability to appeal, or seek § 2255 relief from, his *sentence*. Moreover, a waiver provision does not preclude an appeal or a § 2255 motion based on claims that the plea agreement or the waiver provision were tainted by ineffective assistance. *United States v. White*, 307 F.3d 336, 339 (5th Cir. 2002) (§ 2255 motion); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995) (direct appeal). However, the record in this case is not sufficiently developed for us to address on direct appeal whether counsel provided Lopez with inadequate advice regarding the waiver provision. *See United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987). The record is also undeveloped regarding Lopez's remaining ineffective-assistance contentions; we will not address those contentions on direct appeal.

AFFIRMED.

APPENDIX B — REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION FILED SEPTEMBER 13, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

A-04-CR-209 LY

UNITED STATES OF AMERICA

V.

ARNOLDO LOPEZ

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

The Magistrate Court submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. § 636(b)(3). The District Court referred this case to the United States Magistrate Judge for the taking of the defendant's felony guilty plea and for his allocution pursuant to Federal Rule of Criminal Procedure 11.

On September 9, 2004, the defendant and counsel appeared before the Magistrate Court. The undersigned addressed the defendant personally in open court, informed

him of the admonishments under Rule 11 of the Federal Rules of Criminal Procedure, and determined that he understood those admonishments. Specifically, the Court admonished the defendant that the relevant statute in this case provides for a mandatory sentence of life imprisonment.

Pursuant to a plea agreement, the defendant plead guilty to a single count information charging him with distribution of a quantity of heroin resulting in the death of a seventeen year old girl, following a prior conviction for a felony drug offense, and while in possession of a firearm, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(C) and 18 U.S.C. § 2.

The Magistrate Judge finds the following:

1. The defendant, with the advice of his attorney, consented to enter this guilty plea before the Magistrate Judge, subject to final approval and sentencing by the District Judge;

2. The defendant fully understands the nature of the charge against him and possible penalties;

3. The defendant understands his constitutional and statutory rights, understands that his constitutional and statutory rights can be waived, and understands the meaning and effect of the waiver of his constitutional and statutory rights;

4. The defendant waived his right to have facts that determine his offense level alleged in an indictment and found by a jury beyond a reasonable doubt, agreed to

have the facts that determine his offense level found by the Court at sentencing by a preponderance of the evidence and that the Court may consider any reliable evidence, including hearsay, and waived any constitutional challenge to the validity of the sentencing guidelines;

5. The defendant waived his right to appeal and waived his right under 28 U.S.C. § 2255. The defendant did not waive the right to challenge his sentence to the extent that it is the result of a violation of his constitutional rights based on claims of ineffective assistance of counsel or prosecutorial misconduct;

6. The defendant's plea was made freely and voluntarily;

7. The defendant is competent to enter this plea of guilty; and

8. There is a factual basis for this plea.

RECOMMENDATION

The Magistrate Court **RECOMMENDS** the District Court accept the defendant's guilty plea and, after reviewing the presentence investigation report, enter a Final Judgment of guilt against him.

Appendix B

WARNING

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained within this Report within ten (10) days after being served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations and, except upon grounds of plain error, shall bar the party from appellate review of proposed factual findings and legal conclusions accepted by the District Court to which no objections were filed. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Am*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 472-74 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

The Clerk is directed to mail a copy of this Report and Recommendation to the parties by certified mail, return receipt requested.

SIGNED this 10th day of September, 2004.

s/ Robert Pitman
ROBERT PITMAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JUNE 23, 2006

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-50602

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ARNOLDO LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas, Austin Division

ON PETITION FOR REHEARING

Before JOLLY, DAVIS and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ W. Eugene Davis
United States Circuit Judge

APPENDIX D — RELEVANT STATUTE

21 U.S.C. § 841

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

* * *

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results

from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

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